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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

SEMET-SOLVAY DIVISION,
ALLIED CHEMICAL CORPORATION,
PETITIONER,

v.

JAMES A. MILLER, SR.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Semet-Solvay Division, Allied Chemical Corporation, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on February 17, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, infra, p.p. 11) is not yet officially reported.

JURISDICTION

The Order of the Court of Appeals was entered on February 17, 1969. (App B, infra, p.p. 14). An Order Denying Rehearing was entered by the Court of Appeals on March 7, 1969. (App C, infra, p.p. 15). The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

(1) The quantum of proof necessary to be presented by a plaintiff in a case involving a collision between two vessels on an inland navigable river wherein plaintiff alleges violation of *Navigation Rules For Red River of the North, etc.* Rule 22, 33 U.S.C.A. 347, (a), in order for plaintiff to sustain the burden of proof to show such violation, and to entitle plaintiff to a peremptory direction in the absence of rebutting evidence on behalf of the defendant.

(2) The quantum of proof necessary to be presented by a plaintiff in such a collision case to sustain the burden of proving that defendant was otherwise negligent in the operation of its vessel, and to entitle plaintiff to a peremptory direction in the absence of rebutting evidence on behalf of the defendant.

STATUES INVOLVED

The pertinent part of *Navigation Rules for Red River of the North, etc.,* Rule 22, 33 U.S.C.A. 347, (a), involved is that part which reads as follows:

"(a) Notwithstanding anything contained in sections 301 - 352 of this title, every vessel, overtaking any other, shall keep out of the way of the overtaking vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam shall be deemed to be an overtaking vessel; - - - -."

STATEMENT OF THE CASE

This action involves the collision of two motor vessels each pushing tows upon the navigable waters of the Kanawha River after dark on April 4, 1963. The vessels were the M/V Semet owned and operated by Semet-Solvay Division, Allied Chemical Corporation, defendant, petitioner herein, and the M/V Little Edward, whose Master was James A. Miller, Sr., plaintiff, respondent herein. At the time of the collision, Miller had turned in and was asleep in his quarters in the after end of the Little Edward.

Miller allegedly was thrown from his bunk by the force of the collision, allegedly sustaining injuries.

Miller instituted this action as plaintiff against Semet-Solvay Division, your petitioner, to recover damages for the alleged injuries, suing in the diversity jurisdiction of the District Court, he being a resident of the State of Ohio and your petitioner being incorporated in and a resident of the State of West Virginia.

Miller charged, in his Complaint, that Semet-Solvay Division was negligent in the navigation of

its vessel, the Semet. In particular, his charges of negligence were incompetency of the Semet's crew, her failure to observe "the rules of the road and applicable statutes" and "to keep the Semet under proper control and avoid collision, in operating same too close to the stern of the Little Edward and at too fast and dangerous speed under the circumstances."

Semet-Solvay Division, in its answer to the Complaint filed by Miller, admitted "that defendant owned M. V. Semet and that its employees were operating it up river when its port lead barge came into collision with the stern of M. V. Little Edward."

It also admitted as set forth in the Statement of the Case of Miller in his Brief filed in the Court of Appeals, that "at or about 8 - 9 P.M. on said date, the Little Edward was proceeding upstream with its tow in the vicinity of Mile 26".

The only other evidence in regard to how or why the collision occurred is contained in the testimony of Otis McGowan, plaintiff Miller's witness, on pp. 21 through 23 of Reporter's Transcript of McGowan's testimony, said transcript being part of the record in this action, and on file with this Court.

His testimony was to the effect that he was sleeping in the pilot house of the Little Edward, was roused from his sleep by shouts of the pilot, turned to his rear, saw the Semet lead barge not more than 25 feet to the rear of the Little Edward, didn't wait to find out if the barge was coming in a straight line, or coming in a curve or at an angle, but jumped down in the hold of the vessel at a further shout from the

pilot for him to awaken Miller. He further stated that his vision was not good enough for him to judge distance and speed without staring. The collision occurred immediately thereafter.

Plaintiff offered no other witness as to how or why the collision occurred.

Defendant, Semet-Solvay Division, offered no evidence to rebut plaintiff evidence.

The jury found for the said defendant, and the District Court entered judgment thereon.

The Circuit Court of Appeals for the Fourth Circuit reversed, stated that plaintiff, Miller, was entitled to a peremptory direction, and remanded with an Order for a new trial limited to the issue of damages.

Judgment was entered accordingly by said Circuit Court of Appeals on February 17, 1969, and a rehearing was denied on March 7, 1969.

ARGUMENT OF REASONS FOR GRANTING WRIT

In regard to Questions Presented, both (1) and (2), the decision of the Circuit Court of Appeals of the Fourth Circuit conflicts with both decisions of other Circuit Courts of Appeals and with decisions of this, the Supreme Court, in regard to the burden that the plaintiff has, in an action such as this, of establishing a cause of action by a preponderance of the evidence.

The only evidence in this case before the Court of Appeals were the admissions by the defendant that both vessels, the Semet, the defendant's vessel, and the Little Edward, the plaintiff's vessel, were traveling in a general upstream or upriver direction on the Kanawha River when the lead barge of the Semet came into collision with the stern of the Little Edward, and the testimony of Otis McGowan, testimony as set forth in the Reporter's Transcript in the record of this case. His testimony was as is set out above, in Petitioner's Statement of the Case.

There was no testimony or evidence of any kind submitted by the plaintiff of either the position or course of either the Little Edward or the Semet prior to that time, the speed of either vessel, the weather conditions, whether both vessels were at the time under way in the same direction, one behind the other, or whether, in fact, the Little Edward was moving forward at the time the collision occurred. There was no testimony that the Semet was in fact overtaking the Little Edward.

Specifically as to the alleged violation by the defendant of the *Navigation Rules For the Red River of the North, etc.*, Rule 22, supra, the plaintiff has shown no more than that both vessels were traveling in a general upstream direction prior to the collision, and that a second or two just prior to impact, defendant lead barge was 25 feet somewhere to the rear of the Little Edward.

The question of the quantum of proof necessary to establish the Semet as an "overtaking vessel" was set out by Judge L. Hand in *Ira S. Bushey & Sons*

v. Standard Oil Co., 2nd Cir., 197 F 2d 788, 790, as follows: "It is not enough that a vessel is two points abaft another vessel's beam to make the first an 'overtaking vessel'; she must be steaming at a greater speed so that if she keeps on at her existing speed, the vessel behind will pass the vessel ahead - - - -, for those steady courses which the rules presuppose are not determined by the vessel's headings or speeds at any given moment, but by the future movements of each, so far as the other can reasonably forecast."

This same matter was taken up again by the First Circuit and Judge Hand's interpretation of the statute was confirmed in *Hulton Company v. Arrow Builder's Supply Corp.*, 2nd Cir., 371, F 2d 944, 947, and the Court stated: "It (the rule) was intended to govern the situation in which two vessels are underway in the same direction, one behind the other, with the one proceeding at a greater rate of speed than the one in front. - - - - The overtaking rule only applies to vessels on steady courses."

Petitioner believes that the First Circuit's interpretation of the elements necessary under the statute to prove the Semet an "overtaking vessel" conflicts with what the Fourth Circuit, in the instant case, has implied is necessary to prove the same. Petitioner believes that the First Circuit realized that certain facts are necessary to be proven by the plaintiff, under the statute, before the onerous burden of the rule of *the Pennsylvania*, 19 Wall. (86 U.S.) 125 (1873) is applied. If it were otherwise, the burden of proving the violation of the statute would be left open to surmise, speculation and conjecture.

See 53 *Am. Jur.* § 323, p. 262 and § 358, p. 287; 88 *C.J.S., Trial,* § 2084, p. 439; *Martin K. Eby Construction Co. v. Neely,* 10th Cir., 344 F 2d 482.

Fourth Circuit's decision in the instant case, as a matter of practicality, would require the plaintiff to prove only that two vessels were traveling in the same general direction, and that one, for some unknown reason, struck the rear of the other to stamp the striking vessel as an "overtaking" vessel, and in violation of the statute. The fact that the striking vessel was 25 feet somewhere to the rear of the other an instant prior to collision, with no explanation at all by the plaintiff of how its vessel, or the striking one got into that exact position, would seem to call for some proof by the plaintiff of how each got into that collision position and not leave the matter open to speculation.

The Fourth Circuit's decision conflicts with other Circuits, and this Court, inasmuch as it, as a practical matter in a suit involving collision, has stated that plaintiff is not obligated to present testimony or evidence of facts which would overcome the presumption that each vessel is being operated in a safe manner.

As stated by *Griffin on Collision,* Sec. 24, *Burden of Proof,* quoting Swayne, J., in *the Clara,* 102 U.S. 200 (1880), "The libelants brought the case into Court and thus assumed the affirmative. The burden of proof rested primarily on them. If in this or in any other respect there was delinquency on the part of the respondents, it was for the libelant to prove it. ***In a cause of collision, the plaintiff, in order to

recover entire damages, must prove both care on his part and want of it on the part of the defendant." Further, Griffin states: "If the libelant fails to sustain his burden of proof, the libel will be dismissed, but 'where there is a reasonable doubt as to which party is to blame, the loss must be sustained by the party on whom it has fallen'. *(The Grace Girdler,* 7 Wall. 196, 203, [1869]; *Middlesex Co. v. The Albert Mason,* 2 Fed. 821 [1880]; *the Negawnee,* 20 Fed. 918 [1884]; the *Joseph Stickney,* C.C.A. 2, 56 Fed. 156 [1893]). This general rule has been laid down in many cases *(the L. P. Dayton,* 120 U.S. 337, [1887]; *the Relief,* Olc. 104, Fed. Case 11693 [1845]; *the Melnotte,* 1 Bond 453, Fed. Case 8812 [1861]; *Bergen v. the Joseph Stickney,* 1 Fed. 624 [1880]; *the Charles L. Jeffrey,* C.C.A. 1, 55 Fed. 685 [1893])".

See also *Deisel Tanker F. A. Verdon, Inc. v. Stakeboat* No. 2, 2nd Cir., 340 F 2d 465, 467, wherein it is stated: "When the owner of the Verdon brought its case into Court it assumed the affirmative. With respect to the factual issue of whether the Stakeboat was lighted, the burden of proof rested upon it. The general principle was stated in *Commercial Mollasses Corp. v. New York Tank Barge Corp.,* 314 U.S. 104, 112, 113, 62 S. Ct. 156, 161, 162, 82 L.Ed. 89 (1941), 'Wherever the burden rests, he who undertakes to carry it must do more than create a doubt which the trier of the facts is unable to resolve. ***If the determination of the question is left in doubt, that doubt must be resolved against the shipowner'." See also *Pacific Tow Boat Co. v. States Marine Corp. of Delaware,* 9th Cir., 276 F 2d 745, 750; *Burns Bros. v. Long Island R. Co.,* 2nd Cir., 176 F 2d 406, 408; *Baker, Carver & Morrell Ship Supplies v. Mathiasen,*

etc., 2nd Cir., 140 F 2d 522, 525 and *The J. J. Hill*, 7th Cir., 260 F. 655, 656.

As has been stated on numberous occasions, the mere fact that there was a collision gives rise to no presumption of fault. Fault must be proven.

The Fourth Circuit's opinion in the instant case overlooks that important principle as set out in the cases cited above and in *Gilmore and Black, Law of Admiralty*, 396 (1957) and thus conflicts with the law as applied in these cases.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court issue its Writ of Certiorari to review the decision below.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(February 17, 1969)

PER CURIAM:

A collision involving two motor vessels, each pushing tows, upon the navigable waters of the Kanawha River in West Virginia, after dark on April 4, 1963, is the subject of this action. Both were proceeding upstream, M/V Little Edward ahead of M/V Semet. Without explanation or excuse, the latter shoved one of her towed barges into and over the stern of the Little Edward. At that time, relieved from deck duties, her master, James Miller, had turned in for rest or sleep in his quarters in the after end of the vessel.

Thrown from his bunk by the concussion, the master was painfully hurt. He claimed damages of the Semet-Solvay Division, Allied Chemical Corporation, the Semet's owner and operator, for his injuries, suing in the diversity jurisdiction of the District Court, and put his case on the negligent navigation of the offending Semet. The jury found for the defendant; the Court approved; the plaintiff appeals; and we reverse.

In particular, the charges of negligence are incompetency in her crew, her failure to observe "the rules of the road and applicable statutes" and "to keep the Semet under proper control and avoid collision, in operating same too close to the stern of the

Little Edward and at too fast and dangerous speed under the circumstances".

The happening of the collision in the manner already described is undisputed. No proof in exoneration or extenuation was attempted. Although the action was on the Court's law side, maritime principles were determinative. Pope & Talbot, Inc. v. Hawn, 346 US 406 (1953). Aside from official rules of navigation and statutory directions, prudent seamanship is demanded of the mariner. Default in its exercise is negligence. A collision course reasonably observable, visually or otherwise, must be avoided. Obviously, that obligation was breached here. The evidence suggests nothing obscuring the presence of the Little Edward to the Semet. Inability to prevent collision is not even intimated.

At this location on the Kanawha, "every vessel overtaking any other [is required to] keep out of the way of the overtaken vessel". Western River Rules, No. 22, 33 USC 347. An overtaking vessel is defined as one "coming up with another vessel from any direction more than 2 points abaft her beam". As she was immediately astern of the Little Edward, the Semet was more than two points behind the beam of the Little Edward. The burdened vessel, the Semet was bound to stay clear. This caution finds counterparts in the International Rules, Inland Rules and the Great Lakes Rules. 33 USC 146th, Rule 24; 33 USC 209, Article 24; and 33 USC 287, Rule 22. Thus the duty is a familiar one. The Pennsylvania, 86 US 125 (1873); The No. 25, 266 Fed. 331 (2 Cir. 1920).

The violation of this rule spells negligence. When the Semet transgressed this commandment without

warrant, and disregarded the privilege of the Little Edward to proceed without subordination to the following vessel, the Semet became liable for consequent injuries. No attribution of fault is laid to the Little Edward. The record discloses on her part no requisite lights missing, or no change of course or speed, accounting for the failure of the Semet to avoid her. Nothing here unmakes the liability of the Semet.

The judgment of the District Court approving the jury's verdict is not supportable. Errors in the admission of evidence and in instructions to the jury are urged by the plaintiff for reversal. We need not consider them, for we are convinced that he was entitled to a peremptory direction to the jury to find the defendant answerable for his injuries. In our remand we shall order a new trial limited to the issue of damages, as we think the appellant should not be taxed again with proving liability.

Reversed and remanded.

APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(February 17, 1969)

Appeal from the United States District Court for the Southern District of West Virginia.

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; that this cause be remanded to the United States District Court for the Southern District of West Virginia, at Huntington, with instructions for a new trial limited to the issue of damages, consistent with the opinion of the Court filed herein.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(March 7, 1969)

ORDER DENYING REHEARING

Upon consideration of the petition of appellee, Semet-Solvay Division, Allied Chemical Corporation, for a rehearing, the Court finding no ground therefor, it is

ORDERED that the rehearing be, and it is, hereby denied.